

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DAVID FERGUSON, et al.

Plaintiff,

C-1-02-039

-v-

RYDER AUTOMOTIVE, et al.,

Judge Weber

Defendants.

REPLY TO MEMORANDUM OF DEFENDANT ALLIED SYSTEMS, LTD AND ALLIED
AUTOMOTIVE GROUP., INC., IN OBJECTION TO PLAINTIFFS' MOTION TO QUASH
THE 26(A) DISCLOSURES AND AFFIDAVIT OF SCOTT MACAULEY AND LYNN
BUCKHALT

The Plaintiff David Ferguson replies that the information contained in his Motion to Quash is correct. Defendants Allied do not dispute that these 26(A) disclosures were made after the discovery cut-off date, after the Motion For Summary Judgment date and after the date for Plaintiffs to reply to Defendants Allied Motion For Summary Judgment in witness Lynn Buckhalt case. Therefore, not only couldn't Plaintiff David Ferguson use the discovery purpose of Rule 26(A) as to the witnesses, Plaintiff could not even rebut same in the reply to the Motions For Summary Judgment. Defendants Allied, after all Plaintiffs responses were due to Defendants Allied's Motion For Summary Judgment, files a 26(A) disclosure. Plaintiffs responded to Defendants Allied Motion For Summary Judgment on September 21, 2003, Document 110. Defendants Allied filed the Motion For Summary Judgment on July 9, 2003, Document 84. On October 3, 2003, Defendants Allied, Document 138, filed these 26(A) disclosures. The discovery cut-off date was April 14, 2003, Document 22.

Rule 26(A) Federal Rules provides:

"Rule 26. General Provisions Governing Discovery; Duty of Disclosure

(a) Required Disclosures; Methods to Discover Additional Matter.

(1) Initial Disclosures. Except in categories of proceedings specified in Rule 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to the other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subject of the information;

...

A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures." (Emphasis added)

Defendants Allied have not conformed to Rule 26(A), Federal Rules in the least with these two late disclosures. Plaintiffs specifically addresses Scott Macauley and Lynn Buckhalt Affidavits.

A. SCOTT MACAULEY

Plaintiff will not reiterate their original Motion but affirm same.

Additionally, Defendants Allied try to argue they were somehow surprised by a spoliation of evidence claim against Defendants Allied. However, Defendant Hanes filed a Motion to File a Cross-Claim Against Defendants Allied on March 11, 2003, Document 49, concerning spoliation of evidence. The Motion For Cross-Claim was granted on April 28, 2003, Document 53 and answered by Defendants Allied on May 19, 2003, Document 67. How Defendants Allied can claim in their response to this Motion to Quash at P.3, that, "Given the nature of Plaintiffs' argument, their assertion of an implied spoliation claim at the eleventh hour", is against the facts. As early as March 11, 2003, Defendants Allied knew of a spoliation

of evidence claim.

Finally, a careful examination of Scott Macauley's Affidavit shows that he does not deny that Defendants Allied assumed the liabilities of Defendant Commercial Carriers, Inc.

B. LYNN BUCKHALT

By Defendants Allied's own argument, this witness should have been 26(A)(1) disclosed immediately after Plaintiff David Ferguson's deposition on November 12, 2002.

Now, after everything is filed and no rebuttal allowed, Defendants Allied try to attack Mr. Ferguson's credibility when alleged contributory negligence is not even a defense to this product liability claim. Rule 26(A) must stand for something and should not be used as Defendants Allied have done.

Furthermore, upon reading the Affidavit of Lynn Buckhalt carefully, she is only referring to C.C. Sharrow just one of Defendants Allied's supplier of head cables. This is a reason why 26(A) disclosures should not be allowed after discovery cut-off and Motions For Summary Judgment and Responses to Motions For Summary Judgment have been made.

Defendants Allied's pattern of discovery abuse is documented. Defendants Allied did change Mr. Weaver's testimony causing Defendant Hanes Supply to file a Motion to Strike the Errata of Allied Employee William Weaver. Defendants Allied just recently, by Affidavit, try to change the sworn deposition testimony of Richard Shively. Mr. Shively clearly testified on February 20, 2003:

Q. Do you know what happened to the broken cable that was involved in Mr. Ferguson's injury?

A. No, sir.

Shively depo. P. 8.

Defendants Allied makes the unusual argument that Plaintiff should be refreshing Defendants Allied's employees' recollection at a deposition taken on case examination. Wasn't that Defendants Allied's responsibility? If they disagree with the sworn testimony of Mr. Shively that "he didn't know what happened to the cable involved in Mr. Ferguson's accident" they should have corrected same immediately, not eight months later. Mr. Shively's testimony of lack of knowledge concerning the whereabouts of the cable is the same as the other deponents concerning the cable other than Mr. Weaver who stated the Safety Director Mr. Palladino retained the cable per company policy.

Defendants Allied produced exemplar cables after the discovery cut off. Defendants Allied, when confronted with these discovery abuses, always has the same reply, let's do more discovery, or in the case of the alleged new cables, submit the cables to your expert with maybe a new report and then another deposition.

Defendants Allied are attempting to monetarily cost Plaintiff Ferguson out of this case by continually offering to go back and do more costly discovery for items which should have been disclosed from the beginning. Plaintiffs object to same and cannot afford to go back and redo this case.

Rule 26(A)(1) must stand for something. As used by Defendants Allied, Rule 26(A) need not even exist nor discovery cut-offs exist.

CONCLUSION

The Defendants Allied have improperly designated two 26(A) disclosures, the Affidavits of Lynn Buckhalt and Scott Macauley. Therefore, the 26(A) Disclosure and Affidavits should be

quashed.

Respectfully submitted,

s/Thomas R. Koustmer

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CERTIFICATE OF SERVICE

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